

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**K.M., Appellant**

**and**

**U.S. POSTAL SERVICE, NORVIEW POST  
OFFICE, Norfolk, VA, Employer**

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**Docket No. 12-68  
Issued: May 9, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 18, 2011 appellant filed a timely appeal of the September 12, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year elapsed between the most recent merit decision dated August 13, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

On appeal, appellant contends that the medical evidence of record establishes that he sustained a recurrence of disability commencing January 28, 2007 causally related to his accepted May 10, 2006 employment injuries.

### **FACTUAL HISTORY**

On November 21, 2006 OWCP accepted that on May 10, 2006 appellant, then a 39-year-old part-time flexible mail carrier, sustained a fractured lateral malleolus of the right ankle and enthesopathy of the right ankle and tarsus when he slipped and fell down stairs while delivering mail.

On March 6, 2007 appellant filed a claim alleging a recurrence of disability commencing January 28, 2007.

In an August 13, 2007 decision, OWCP found the evidence of record insufficient to establish that appellant sustained a recurrence of disability commencing January 28, 2007 causally related to his accepted May 10, 2006 employment injuries.

On March 5, 2011 appellant requested reconsideration.

In a March 11, 2011 decision, OWCP denied appellant's March 5, 2011 request for reconsideration, without a merit review, on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated August 13, 2007.

On April 5, 2011 appellant appealed to the Board. In a May 1, 2011 letter, he advised the Board that he would like to seek reconsideration and submit new evidence to OWCP.

In a May 16, 2011 letter, appellant requested reconsideration before OWCP. In a March 24, 2011 letter, the employing establishment advised him that he was placed in an absent-without-leave status because he failed to submit a written request for leave or written notice or justification to substantiate his absence from work since January 27, 2007. A May 12, 2011 letter from the employing establishment approved appellant's request for light-duty work and provided instructions for reporting to work. Guidelines dated January 5, 2006 pertaining to the employing establishment's Employee and Labor Relations Manual (ELM) outlined procedures for initiating compensation for a totally disabled employee.

Letters dated March 3, 2010 and June 14 and August 9, 2011 from a Department of Veterans Affairs (VA) Medical Center advised appellant about his appointments scheduled on April 26, 2010 and August 4 and 17, 2011, respectively. An April 1, 2011 medical slip indicated that appellant provided blood and urine samples to a laboratory on that date.

In an order dated June 8, 2011, the Board dismissed appellant's appeal.<sup>3</sup>

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<sup>3</sup> Docket No. 11-1128 (issued June 8, 2011).

In a decision dated September 12, 2011, OWCP denied appellant's May 16, 2011 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated August 13, 2007.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>4</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>5</sup> OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of its implementing regulations provide that an application for reconsideration must be sent within one year of the date of OWCP decision for which review is sought.<sup>6</sup>

Section 10.607(b) states that OWCP will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by OWCP in its most recent merit decision. The reconsideration request must establish that OWCP's decision was, on its face, erroneous.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>9</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>12</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.<sup>13</sup> The

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> *Id.* at § 10.607(b).

<sup>8</sup> *Nancy Marciano*, 50 ECAB 110, 114 (1998).

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

### ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>15</sup> However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>16</sup>

The most recent merit decision in this case was OWCP's August 13, 2007 decision, which found that appellant did not sustain a recurrence of disability commencing January 28, 2007 due to his accepted May 10, 2006 employment-related injuries. As appellant's May 16, 2011 letter requesting reconsideration of the merits of his claim by OWCP was made more than one year after the August 13, 2007 merit decision,<sup>17</sup> the Board finds that it was not timely filed.

The Board further finds that the evidence submitted by appellant in support of his untimely May 16, 2011 request for reconsideration does not establish clear evidence of error on the part of OWCP. The underlying issue in this case, whether he established a recurrence of disability beginning January 28, 2007 causally related to the May 10, 2006 work injuries, is medical in nature. The letters from the VA medical center indicated that appellant had medical appointments scheduled on April 26, 2010 and August 4 and 17, 2011. The April 1, 2011 medical slip indicated that he provided blood and urine samples to a laboratory on that date. This evidence did not address the relevant issue of whether appellant sustained the claimed recurrence of disability due to the accepted injuries. Evidence that is not germane to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.<sup>18</sup> The Board finds that the VA letters and medical slip are insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim.

Similarly, the employing establishment's letters regarding disciplinary action taken against appellant and his work assignment and its ELM guidelines concerning the initiation of compensation for a totally disabled employee are not relevant to the issue in this case of causal relation between his claimed recurrence of disability and the accepted injuries. The Board finds, therefore, that this evidence is insufficient to establish clear evidence of error.

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<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>15</sup> *Supra* note 6; *see A.F.*, 59 ECAB 714 (2008).

<sup>16</sup> *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>17</sup> Appellant had one year to request reconsideration by OWCP of its August 13, 2007 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

<sup>18</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010).

The Board finds that the evidence submitted by appellant in support of his untimely request for reconsideration does not constitute positive, precise and explicit evidence, which manifests on its face that OWCP committed an error. Therefore, appellant failed to meet his burden of proof to show clear evidence of error on the part of OWCP.

On appeal, appellant contended that the medical evidence of record established that he sustained a recurrence of disability commencing January 28, 2007 causally related to his accepted May 10, 2006 employment injuries. As noted, the Board does not have jurisdiction over the merits of this appeal. The Board only has jurisdiction over the issue of whether OWCP properly determined that appellant's reconsideration request was untimely filed or established clear evidence of error by OWCP. As explained, the evidence submitted on reconsideration is insufficient to establish clear evidence of error by OWCP.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board